United States Postal Service *and* James Edward Wiles and National Association of Letter Carriers. Cases 11-CA-10270-P and 11-CA-10632-P

29 February 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 31 August 1983 Administrative Law Judge Richard A. Scully issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions only to the extent consistent with this Decision and Order.

The Respondent has excepted to the judge's conclusion that it violated Section 8(a)(1) of the Act when it did not inform Charging Party Wiles before he reported for work on the morning of the hearing in this case that he could have the 2 additional hours of leave that he had requested from the Respondent the previous evening. We find merit in this exception.

The Respondent had originally arranged for Wiles to work only 2 hours (from 7 to 9 a.m.) on 20 August 1982 so that he could attend the hearing, which was scheduled to begin at 10 a.m. After work on 19 August, around 6 p.m., Wiles asked Supervisor Blackwood to release him from the following day's schedule so that he could meet with counsel for the General Counsel before the hearing. Blackwood told Wiles that, because another supervisor was in charge of scheduling, Blackwood could not authorize the leave. Wiles requested that Blackwood look into the matter and call Wiles at home if he obtained the necessary authorization. After Wiles left, Blackwood arranged the leave and attempted to telephone Wiles but was unable to reach him. The next day, Wiles drove 40 miles from his home to report to work at 7 a.m. When he arrived, Supervisor Riley told him that his leave request had been granted, and Wiles left the premises.

In view of the belated timing of Wiles' request, the Respondent's obvious need to follow orderly staffing procedures, Supervisor Blackwood's good-faith attempt to accommodate Wiles' request, and the lack of evidence that the Respondent deliberately deceived Wiles, we find that the General Counsel has not proved by a preponderance of the evidence that the Respondent unlawfully interfered with Wiles' right to participate effectively in this proceeding. Accordingly, we shall dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

DECISION

RICHARD A. SCULLY, Administrative Law Judge: Upon charges filed by James E. Wiles on January 20, 1982, and by National Association of Letter Carriers (the Union) on October 7, 1982, the Regional Director for Region 11 of the National Labor Relations Board (the Board) issued complaints on March 3, 1982, and November 19, 1982, alleging that United States Postal Service (the Respondent) had committed certain violations of Section 8(a)(1) of the National Labor Relations Act, as amended (the Act). The Respondent has filed answers denying that it has committed any violation of the Act.

The cases were consolidated for hearing and were heard in Durham, North Carolina, on August 20 and October 13 through 15, 1982, and in Chapel Hill, North Carolina, on January 24, 1983. The parties were given a full opportunity to participate, to examine and cross-examine witnesses, and to present other evidence and argument. Briefs submitted on behalf of the General Counsel and the Respondent have been given due consideration.[1]

[1] The General Counsel has excepted to the judge's denial of his motion to strike certain portions of the Respondent's posthearing brief. We find merit in this exception, to the following extent. The Respondent in its brief relies on off-the-record discussions concerning the establishment of a witness release schedule, and the judge refers to such discussions in his decision. These references do not appear to have resulted in any prejudice, for the judge's conclusion that the Respondent did not interfere with subpoenaed witnesses is amply supported by credited testimony in the record. Nonetheless, we wish to make it clear that we place no reliance on any off-the-record matters set forth by the judge, and hereby grant the General Counsel's motion to strike all references to such matters from the Respondent's brief.

[2] The Respondent has excepted to the judge's denial of its motion to dismiss the complaint in Case 11-CA-10632-P, which contained both the allegation discussed later in this decision, and another allegation that the judge dismissed on the merits. Citing *Jefferson Chemical Co.*, 200 NLRB 992 (1972), the Respondent argues that the original complaint in Case 11-CA-10270-P should have been amended to include these allegations while the original hearing was still in session, that the two complaints should not have been consolidated, and that the hearing should not have been reopened to adduce evidence on the second complaint. Because, as set forth below, we dismiss this entire matter on the merits, we find it unnecessary to rule on the Respondent's procedural contentions.

[3] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[1] The General Counsel's motion to strike portions of the Respondent's brief is denied. The General Counsel's motion to file a reply brief, which the Respondent has opposed, is also denied. All issues were adequately treated in the parties' initial briefs.

On the entire record and from my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaints allege, the Respondent admits, and I find that the cases are within the jurisdiction of the Board by virtue of Section 1209 of the Postal Reorganization Act (the PRA), 39 U.S.C. 101, et seq.

II. THE LABOR ORGANIZATION

The Respondent admits and I find that, at all times material, the Union was a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

James Wiles is a regular city letter carrier employed at the Respondent's Post Office in Chapel Hill, North Carolina. He is a member of the Union and has worked for the Respondent since April 1973. He has been at the Chapel Hill post office since transferring there in August 1976. Prior to February 1981, Wiles was a part-time flexible carrier (PTF) working on an as-needed basis, filling in for regular carriers on their days off, when they were on leave, or assisting regular carriers when the volume of mail was heavy. A PTF's assignment was generally determined by management until mid-1978 when PTF's were given a right to bid, on the basis of seniority, for mail routes which were to be vacant for a period of 5 or more days, in the national collective-bargaining agreement entered into by the Respondent and the unions representing its employees.[2] A successful article 41 bidder would "case and carry" the route chosen during the period that the regular carrier on the route was off. "Casing" is the process of taking pieces of mail of various types, letters and flats, and putting them in a case which has the addresses on the route in sequence. After casing, the mail is bundled, placed in the carrier's vehicle, and delivered. The Respondent has minimum casing standard requirements and attempts to adjust its routes so that they can be cased and carried in 8 hours on an average day. A special office count is a procedure wherein the volume of mail on a route is determined by manually counting each piece, the time the carrier takes in casing and carrying the route is recorded, and the volume of mail and time used are compared in order to determine if the carrier meets the Respondent's efficiency standards.

The General Counsel contends that the Respondent violated Section 8(a)(1) of the Act by conducting special office counts on James Wiles in order to harass him because he exercised the contractual right to bid on temporarily available routes while he was a PTF and because he filed grievances pursuant to the contract, and that it also harassed Wiles by requiring him to work overtime on the day prior to the start of the hearing herein and by requiring him to report to work as scheduled on the morning the hearing opened.

[2] This is commonly referred to as an "Article 41 bid."

The first special office count alleged as a violation in the complaint was conducted on Wiles on July 23, 1981, while he was carrying city Route 3. Other alleged violations were special office counts conducted the following day, July 24, on July 28 and 30, on city Route 2, and on August 13, on city Route 20. In the absence of any direct proof that these special office counts were the result of protected activity on Wiles' part, the General Counsel points to various incidents which occurred over a period of nearly 5 years preceding these special counts and contends that they create an inference that protected activity motivated the Respondent's alleged harassment of Wiles. The incidents the General Counsel relies on are as follows: (1) In 1977, Wiles was discharged by the Respondent and was later reinstated with backpay pursuant to an arbitrator's decision. (2) A conversation between Chapel Hill Postmaster Fred Reigher and then Union Local President Emmett Pendergraph in which Reigher said he "didn't think he would accept another transfer" and made a "vague reference" to Wiles as being the reason he felt that way. (3) In early 1979, Supervisor of Mails Charles Holloway threatened Wiles and other PTF's that if they exercised the new contractual right to bid on vacant routes, they would be subjected to special office counts and, if they did not perform satisfactorily, they would be given letters of warning, and confirmed this threat in writing. (4) Thereafter, Wiles was the first Chapel Hill PTF to bid on a route pursuant to the new contract right. He was given a special office count on his first day on the route and received a letter of warning. Wiles filed a grievance with the Respondent and an unfair labor practice with the Board, which issued a complaint. The grievance and the complaint were informally resolved, the warning letter was withdrawn, and a notice posted. (5) During early 1979, Postmaster Reigher and Supervisors Robert Blackwood and Cecil Riley warned Wiles that he would be disciplined if he made a bid on a route pursuant to section 41. (6) In July, 1981, Wiles made a successful article 41 bid on Route 3. On July 14, his second day on the route, Wiles was given a special office count and street supervision and he filed a grievance over this. (7) Wiles filed more grievances than other carriers. (8) Wiles was given substantially more special office counts than other PTF's.

After looking closely at the circumstances surrounding all of these incidents and allegations I find that, taken singly or together, they fail to establish, or to create a reasonable inference, that the special mail counts conducted on Wiles during July and August were in retaliation for or were intended to harass him because he filed article 41 bids and/or grievances pursuant to the collective-bargaining agreement.

The evidence concerning Wiles' termination in 1976 indicates that he had asked Postmaster Reigher for an extended leave of absence in order to attend law school, which Reigher was unable to grant. Thereafter, Reigher, believing that Wiles was going to attend school and had orally tendered his resignation, processed the resignation. After he was terminated as a result of this, Wiles filed a grievance. Ultimately, an arbitrator ordered Wiles reinstated with backpay, having found that Wiles had not, in

fact, resigned and that there had been "a breakdown or misunderstanding of communications." Reigher credibly testified that the outcome of the arbitration "doesn't agitate me now, nor has it ever." Reigher testified that he believed, on the basis of supervisors' reports that Wiles used unnecessary overtime on the job; however, there is no evidence that he conducted or ordered that special mail counts be conducted on Wiles and nothing to suggest that they were the result of unhappiness on his part because of the arbitrator's ruling more than 3 years earlier. Reigher was not asked about his statement to Pendergraph about not accepting other transfers. While Pendergraph's testimony is uncontradicted, I do not find it to be persuasive evidence of anything. The date of this conversation was never pinpointed and, even if Reigher did make a "vague reference" to Wiles, as Pendergraph stated, this cannot be considered as establishing that Reigher harbored animus toward Wiles because of his union or other protected activity.

Sometime in 1979, Wiles was the first Chapel Hill PTF to make a bid on a vacant route pursuant to article 41. According to Wiles, Charles Holloway told Wiles and other PTF's that they had better not exercise their rights under article 41 or they would be given special office counts and, if they did not perform satisfactorily, they would be given a letter of warning. Holloway also gave him a written statement to the same effect. Wiles filed a grievance and an unfair labor practice charge with the Board based on Holloway's alleged threat. Both the grievance and an unfair labor practice complaint issued as a result of Wiles' charge were informally resolved in January 1980. The Respondent posted a notice disavowing any threats of reprisals against employees for exercising contractual rights and stating that employees would not be given special office counts or otherwise be retaliated against because they filed grievances or exercised other contractual rights. In the absence of evidence to the contrary, it may be assumed that Wiles and other PTF's continued to bid on routes pursuant to article 41 after this notice was posted. There is no evidence that the Respondent did not act in accordance with the statements in that notice between January 1980 when it was posted and July 1981 when the special office counts that are the subject of the instant case took place. From all that appears, no adverse action was ever taken against Wiles or any other PTF because they made an article 41 bid.

Wiles also testified that within a month of the time that Holloway made his alleged threat, Postmaster Reigher and Supervisors Robert Blackwood and Cecil Riley, all made similar threats that PTF's would be disciplined if they exercised the right to bid under article 41. Each of the three supervisors denied making any such threats and, while the threats were supposedly directed to all PTF's, Wiles was the only one to testify that he heard them. Although, according to Wiles, these threats were similar to and made around the same time as Holloway's alleged threat, Wiles did not mention them in the charge he filed with the Board or while it was being investigated and there are no references to them in the complaint issued on the basis of Wiles' charge. I do not credit Wiles' testimony concerning the threats by Reigher, Blackwood, or Riley.[3]

There are significant differences between the situation in 1979, in which Holloway allegedly threatened Wiles with a special office count if he made an article 41 bid on a route, and that in July 1981 when Wiles was given a special office count following an article 41 bid on Route 3, which convince me that the Respondent was not reverting to the policy it had renounced in settling the unfair labor practice case arising out of the 1979 incident. Holloway's oral and written statements to Wiles in 1979 related to a bid on a route Wiles' was unfamiliar with and, thus, involved a situation where Wiles might be expected to encounter delays in casing and carrying the mail. He also stated that Wiles would be given an office count on his first day on the route. Wiles' July 1981 bid on Route 3 was not on a route he was unfamiliar with, since he had previously carried that route on several occasions, and he was not scheduled for a special office count on his first day on the route simply because he had made an article 41 bid. While Wiles was given a special office count and street supervision on July 14 his second day on Route 3, the evidence indicates that this came about because of Wiles' use of overtime on that route on July 13. Supervisor Blackwood testified that he told Wiles he would have a special office count and street supervision the following day after Wiles took nearly 7 hours to deliver a route which Blackwood said should have been delivered in about 5-1/2 hours. According to Blackwood, he had previously had problems with Wiles' taking longer on routes than other carriers. Blackwood said he had talked to the regular carrier on the route, Danny Straub, who had cased the route in the morning before going on leave, about the volume of mail and was told by Straub that it was a regular day and that there would be no problems with the delivery. Under the circumstances,[4] I find no basis for concluding that

[3] After observing Wiles' demeanor during the hearing and considering his testimony, I find that he had an obvious bias against the Respondent and his supervisors which countered any enhanced credibility his testimony might normally have by reason of the fact that he is still employed by the Respondent. See *Gold Standard Enterprises*, 234 NLRB 618 (1978). Wiles' testimony contained several self-serving interjections and seemed calculated to portray himself as continually being the innocent victim of unresonable supervisors. Typical was his story about Supervisor Cecil Riley, who Wiles said was waiting for him when he came out of a restaurant in March 1981. Riley told Wiles he was giving him an "official write-up" for taking 2 extra minutes for lunch. According to Wiles, he filed a grievance with then Acting Postmaster Cassell who agreed that Wiles had not exceeded his allowed lunch break, but told Wiles he could not destroy the writeup "because it was Cecil Riley's form." I did not believe Wiles' story for several reasons. Fred Reigher was the postmaster in March 1981, not Cassell, who had been acting postmaster in Chapel Hill for a 120-day period in 1980. There was no record of any grievance in the Respondent's grievance files and Wiles produced no evidence that he filed one. The alleged resolution of the grievance, as described by Wiles, that the postmaster, although he vindicated Wiles, could not remove the writeup "because it was Cecil Riley's form" borders on being ludicrous. Wiles appears to have placed this alleged incident in March 1981 in order to make it appear that a special mail count conducted on him in April 1981 was part of a pattern of continuous harassment.

[4] The General Counsel contends, based on testimony of Wiles, that the volume of mail on the route on July 13 was unusually heavy, that because Wiles had not cased the route it took longer to deliver, and that these factors accounted for the prolonged delivery time. Wiles testified

Continued

Blackwood acted unreasonably in scheduling Wiles for an office count and street supervision or to believe that, if Wiles had delivered the route on July 13 in a timely fashion, he would have been counted and street supervised on July 14. There is no reason to believe that protected activity on Wiles' part was in any way responsible for the special supervision he received on July 14.

Wiles filed a grievance because of the office count and street supervision on July 14. Special office counts were conducted on him on July 23 and 24, while he was still on Route 3, and on July 28 and 30 on Route 2 and on August 13 on Route 20. As noted above, while there is evidence that, in 1979, the management at the Chapel Hill post office may have sought to discourage PTF's from bidding pursuant to article 41, that policy was abandoned not later than January 1980. There is no evidence which would support an inference that any of the special mail counts on Wiles in July or August 1981 was the result of his having made an article 41 bid on a vacant route. A question remains whether the special counts on July 23, 24, 28, and 30 and on August 13 were done because Wiles filed a grievance over the supervision he was given on July 14. There is little direct evidence one way or the other.

The fact that Wiles was counted several times after he filed a grievance might raise some suspicions. On the other hand, a special office count is not a form of disciplinary action. According to Charles Holloway, who conducted these special counts, it is not only a method of measuring a carrier's efficiency, but is also a means of training and correcting bad habits a carrier may have developed. Holloway testified that such counts may be given to all carriers, but are given to PTF's more often than to regular carriers, who usually are proficient in casing their routes. He also testified that most carriers do not complain about having special counts conducted on them. Consequently, there is some question as to whether conducting a special count on a carrier should necessarily be considered harassment. No disciplinary action was taken against Wiles as a result of his performance on any of these special counts. However, even assuming that a special office count can be used as a means of harassing a carrier, I find no evidence to support the allegation that these special counts of Wiles were conducted because he had filed a grievance, with the exception of the fact that they began after it was filed. It has not been established exactly when his grievance was filed. If it were on July 14, the day of the supervision Wiles objected to, the next special count was more than a week later on July 23. Holloway, whom I found to be a credible and convincing witness, was not specifically asked about the reasons he conducted the five special counts in issue, but he denied that he ever conducted special counts in order to harass an employee. He testified that he had conducted special counts on Wiles to improve his job performance. He said that Wiles' work was inconsistent; that some days he did a good a job and other days it was not so good; that he had discussed Wiles' faults with him numerous times; and that he had tried to get Wiles to correct them. Wiles did not deny this. While Wiles may have received more special counts than other PTF's, Holloway also testified that Wiles' productivity seemed to increase when he was being counted. Postal Service records in evidence support this. They indicate that on July 22, the day prior to the first special count of Wiles alleged as a violation in the complaint, he used over 2 hours of overtime on Route 3, which, at that point, he had been delivering for more than a week. On July 23 and 24, days on which special counts were conducted, he used only .14 and .30 hours of overtime, respectively. On July 27, he used 1.24 hours of overtime on a day when the mail volume was apparently light.[5] He was given a special mail count on July 28 and incurred only .06 hours of overtime. On July 29, Wiles used .84 hours of overtime, but, when counted on July 30, he used only .13. Considering all of the evidence, I find it substantially more likely that the special mail counts in issue were conducted on Wiles in order to improve his job performance and reduce his use of overtime than that they were done in order to harass him because he filed a grievance. Accordingly, I find that the General Counsel has failed to prove these allegations by a preponderance of the evidence and shall recommend that they be dismissed.

The complaint also alleges that special mail counts were conducted on Wiles on January 8 and 12, 1982, because he bid under article 41 and, on January 11, 1982, because he filed a grievance. There is no evidence that a special mail count was conducted on Wiles on January 8, 1982, although he was the subject of street supervision by Supervisor Blackwood that day. There is nothing to suggest that this was anything but routine supervision periodically given all carriers; that it was meant to harass Wiles;[6] or that it was the result of an article 41 bid or the filing of a grievance by Wiles.[7]

that the regular carrier, Straub, had told him that the mail was "very heavy, that three days of mail had been stuck up by him but had not been delivered." However, Straub testified that he did not recall talking to Wiles about the volume of mail that day, which he described as "average to just barely above average" despite the fact that 2 days of third-class mail was included. There is nothing in the record to establish that the fact Wiles had not cased the mail or the fact that he had trouble starting his vehicle that day would have added more than an hour to the normal delivery time for the route.

[5] On the 24 other routes delivered that day, only 3, all being delivered by PTF's, incurred overtime of .06, .13, and .11 hours, respectively.

[6] The alleged harassment apparently was what Wiles described as Blackwood's "outrageous" conduct of parking his car beside Wiles' vehicle and glaring at Wiles while he ate his lunch. According to Blackwood, during the course of the street supervision he parked his car in a parking lot about 40 feet to the rear of Wiles' vehicle "where he wouldn't observe me and I wouldn't observe him." I credit Blackwood's testimony.

[7] The General Counsel may be relying on the testimony of employee Rudolph Tempesta as providing evidence that Blackwood was continually engaged in harassing Wiles. According to Tempesta, "roughly around Labor Day" in 1981, he overheard Blackwood speaking to Holloway about Wiles and Blackwood said: "I am going to get that son-of-a-bitch." Blackwood credibly denied making the statement and Holloway credibly denied that Blackwood made it to him. Although recognizing that Tempesta is a current employee, I do not credit his testimony, which was often argumentative, exaggerated, and evasive. For example, on cross-examination, although he said he has worked at the Chapel Hill Post Office for 38 years, he said he did not know that Blackwood was the number two man at the post office and it took four questions to get him to grudgingly admit that Postmaster Reigher was the number one man. He gratuitously accused counsel for the Respondent of trying to insult him and claimed that he had been harassed by the Respondent for 30 years. I consider his testimony unreliable and find there is no credible evidence that Blackwood made the statement attributed to him by Tempesta.

Wiles was given street supervision on January 11, 1982, and was also given a special office count on the next day. According to Wiles, on the morning of January 11, Cecil Riley came to him while he was casing his mail and told him that, based on the measured volume of mail on his route, he should be out of the post office by 8:30 a.m. Wiles disputed the correctness of the volume measurement, but Riley insisted he should be out by 8:30. Wiles then complained to Union President Pat Morris who was nearby and Morris spoke with Riley on Wiles' behalf. Wiles told Riley he wanted to speak with Morris about filing a grievance, but Riley refused to permit him to do so. Wiles then asked Blackwood for permission to discuss a grievance with Morris, but he also refused and ordered Wiles back to work. Riley later allowed Wiles to speak with Morris and, when he returned to his desk, Riley came over to him and told him he would have a special mail count on the following day and that Riley would follow him on the street that day.

Robert Blackwood testified that, when he began street supervision of Wiles at 12:55 a.m. on January 8, Wiles was running behind schedule. When Blackwood returned to the post office that afternoon, he told Riley that Wiles had lost time on the early part of his route, and that he should street supervise Wiles at least on the first part of his route and that he should give Wiles a special office mail count because of his low productivity in the office. Blackwood directed Riley to do the street supervision on Monday, January 11, and they decided to do the special office count on January 12. On the morning of January 11, Blackwood entered the carrier section while the carriers were on break and found Riley at Wiles' case. Riley pointed out Wiles' low productivity in casing to Blackwood. When Wiles returned from his break, Riley told him he would have a special mail count the next day. Wiles got very excited and called for Morris to come over because Riley was harassing him and was going to give him a mail count. Riley told Wiles to quiet down and continue casing and he would make arrangements for him to see his steward. Wiles then approached Blackwood about seeing the steward and he told Wiles that Riley would have to handle it. Riley's testimony corroborates that of Blackwood both as to the fact that Blackwood ordered both street supervision and a special office count on Wiles on Friday, January 8, after he had street supervised Wiles and that Wiles' demand to see his union steward on January 11 occurred after Wiles returned from his break and Riley told him he would have a special office count the next day.

I credit the consistent testimony of Blackwood and Riley as to what prompted the special office count of Wiles on January 12 and that it was decided upon on January 8. I also credit their testimony as to what occurred on the morning of January 11 over that of Wiles.[8] Accordingly, I find no basis to conclude that the special office count was as a result of Wiles' having filed a grievance on January 11 and shall recommend that this allegation be dismissed.

At the hearing on August 20, 1982, the complaint in Case 11-CA-10270-P was amended to allege that the Respondent had violated Section 8(a)(1) by requiring Wiles to work longer hours because of his protected concerted activities and because of his participation in that case. Wiles testified that on August 19, 1982, when he reported for work, he showed Cecil Riley his subpoena to appear at the hearing scheduled to begin on the following day and began casing his mail. He later requested auxiliary help on his route. He was given help in casing his mail but his request for 1.25 hours of delivery help was denied. He delivered his route which had a heavy volume of mail and upon returning to the post office around 5:15 p.m. was ordered by Riley and Blackwood to stay and case third-class nonpreferential mail. According to Wiles, this was something that he usually did not do since he had become a regular carrier. However, that evening he was ordered to do it until 6 p.m. and he did so. Wiles said that he did not recall having to work 10 hours in a day since becoming a regular carrier. Before leaving the post office, Wiles, who was scheduled to begin work at 7 a.m. on the next day, asked Blackwood if he could be off in the morning in order to meet with his attorney and be fresh for the trial. Blackwood denied his request. Wiles asked Blackwood to contact trial counsel for the Respondent to see if he could be let off and, if he could, to telephone him at home. Wiles, who lives about 40 minutes from the post office, received no telephone call and reported for work at 7 a.m. on August 20. After he had been there a few minutes, Riley told him he was not needed and could leave.[9]

[8] Wiles' testimony, that Riley told him he should be out of the post office by 8:30 a.m. on January 11, is uncorroborated and other factors convince me that Wiles' testimony about this incident should not be credited. Union President Morris, to whom Wiles says he complained at the time and who Wiles says spoke at some length with Riley on his behalf, was not called as a witness. Although Wiles testified that he was informed of the special office count immediately after he had spoken with Morris about filing a grievance, the written grievance form filled out by Morris states that Wiles discussed the grievance with Union Steward Tempesta on January 11. Wiles also testified that just before he argued with Riley about whether the measurement of the volume of mail on Wiles' route was correct, another carrier, Riley's brother, had complained that the measurement of his mail was incorrect and Riley had changed it. However, the Postal Service document on which the measurements were recorded shows no evidence that the measurement for Riley's brother had been changed. Finally, the Postal Service document, in which the expected times for leaving the office (expressed in hundredths) based on each carriers' volume of mail is entered, shows that Wiles was expected to leave at 9:84 not 8:50 (8:30 a.m.).

[9] This incident, involving the Respondent's failure to timely grant Wiles' request for leave was one of the violations alleged in the complaint in Case 11-CA-10632-P, which issued on November 19, 1982, following the filing of a charge by the National Association of Letter Carriers on October 7, 1982, alleging that the Respondent interfered with witnesses subpoenaed to appear on August 20. The Respondent contends that the complaint in Case 11-CA-10632-P should be dismissed because it involves an attempt to litigate or relitigate matters which should have been heard in Case 11-CA-10270-P, citing the Board's decisions in *Jefferson Chemical Co.*, 200 NLRB 992 (1972), and *Union Electric Co.*, 219 NLRB 1081 (1975). Its argument is somewhat surprising given its position in response to the General Counsel's motion to amend the complaint in Case 11-CA-10270-P, made at the hearing on August 20, to include the other allegations of harassment of Wiles on August 19. Then, the Respondent argued that that incident should be the subject of a new or amended charge which it should have a chance to respond to and the General Counsel to fully investigate before being included in a complaint. Now, when other alleged violations occurring on August 19 and 20 were made the subject of a new charge and complaint, it claims they should have been litigated as a part of Case 11-CA-11270-P. This, after it op-

Continued

Based on the uncontradicted and credited testimony of Cecil Riley, I find that all of the carriers in the Chapel Hill Post Office cased third-class mail upon returning from their routes on August 19, as did Wiles, and that they did so on other occasions. It appears that requiring Wiles to case this mail was nothing out of the ordinary and that the reason his workday lasted 10 hours was primarily because of the extra time it took him to case and carry his route. The preponderance of the evidence does not establish that Wiles was required to work longer hours than he normally would have on August 19 or any other day or that he was required to work an extra 45 minutes that day because of his union or other protected activities or because he was involved in the hearing in this matter.

As for the Respondent's action in refusing to excuse Wiles from coming into work at 7 a.m. on August 20, the morning the hearing in this case was to start, I find nothing which would justify that action. Wiles gave his supervisors timely notice that he had been subpoenaed to attend the hearing and they were certainly aware of his role as the charging party in the case. He specifically asked to be excused from reporting to work that morning so that he could talk with his attorney and prepare for the hearing, but was refused. That the Respondent had no particular need for Wiles' services that morning is evident from the fact that he was excused immediately after he reported for work. By refusing to excuse Wiles beforehand, the Respondent caused him to make the 40-minute trip from his home to the Chapel Hill Post Office prior to 7 a.m., while the hearing was scheduled to commence in Durham, North Carolina, at 10 a.m. Whether it was deliberate or not, I find such action clearly interfered with Wiles' rights to participate in this proceeding in violation of Section 8(a)(1).[10]

The complaint in Case 11–CA–10632–P also alleges that the Respondent violated Section 8(a)(1) of the Act by telling subpoenaed employees that they would not be allowed to attend the hearing on August 20, 1982. Prior to August 20, James Wiles had obtained and served Board subpoenas on at least six employees of the Chapel Hill post office directing them to appear at the hearing in Durham at 10 o'clock that morning. Wiles and Rudolph Tempesta had been subpoenaed by the General Counsel. Wiles testified that on the morning of August 19 he gave Cecil Riley the names of the employees he had subpoenaed. Riley wrote the names down, looked at the subpoena of each employee, and said there would be no problem in letting all of the subpoenaed employees off at 9 a.m. on August 20. He said that Riley changed the schedule to show all of the employees as getting off at 9 a.m. and the replacements on their routes. At 6 p.m., while Wiles was casing mail after returning from his route, Riley told him that he had changed the schedule back, that his witnesses were not going to be let off and the reason was that trial counsel for the Respondent "had ordered them not to be let off."

Employee Emmett Pendergraph testified that he received a subpoena from Wiles prior to August 20 and took it to his supervisor who told him he would have to check with Blackwood about it. Pendergraph spoke with Blackwood on August 20 at 7 a.m. and was told Blackwood would get back to him. He said that Blackwood came back to him about 9:30 a.m. and told him that he would have to stay and work because the Respondent's attorney had told Blackwood not to let him off. On cross-examination, Pendergraph reluctantly admitted that what Blackwood said to him was "that some arrangements would be made in the future for us to appear in such a manner that they could continue the operation of the Chapel Hill Post Office."

The testimony of the other employees Wiles subpoenaed fails to establish that any of them was told that he would not be allowed to attend the hearing on August 20, as alleged in the complaint. On the contrary, their consistent testimony was that, when each discussed attending the hearing with a supervisor, he was told that an arrangement would be made whereby they would be let off work to go to the hearing as needed and, in the case of carriers out delivering mail, their routes would be covered for them. The testimony of Riley and Blackwood is consistent with that of the subpoenaed employees. Upon learning that several employees had been subpoenaed to appear at the hearing on August 20 and that there was a shortage of manpower, counsel for the Respondent informed Riley and Blackwood that he would attempt to work out a plan whereby witnesses would be called to the hearing as needed. Accordingly, Riley told subpoenaed employees not to go to the courthouse in Durham, but to report to work and that they would be relieved to attend the hearing as needed. As it turned out, none of the witnesses was called on August 20. From all that appears, when the hearing resumed on October 13, Wiles' witnesses were released to appear when needed by Wiles.

---

posed the General Counsel's motion at the conclusion of the hearing to hold the record in that case open until the charge concerning those incidents could be investigated and resolved.

The violations alleged in Case 11–CA–10632–P involve matters which occurred long after the charge in Case 11–CA–10270–P was investigated and a complaint had issued. Indeed, certain of the actions involved occurred the day the hearing in that case commenced and the General Counsel finished presenting evidence (with the exception of certain documents offered when the hearing resumed). Under the circumstances, I find no evidence that the Respondent has been prejudiced or denied due process by reason of the fact that certain incidents occurring on August 19 and 20, 1982, were the subject of a new charge and new complaint. I also find that the issue of whether Wiles' rights were violated by the Respondent's refusal to timely grant his request for leave to attend the hearing on August 20 was fully litigated during the hearing on Case 11–CA–10270–P and, if the General Counsel's posthearing motion to reopen and consolidate cases should properly have been considered as a motion to amend the complaint in that case to include that issue, it should be granted. The Respondent should not be permitted to avoid responsibility for its unlawful actions because of a procedural technicality.

[10] Blackwood testified that he told Wiles on August 19 that Riley was handling the scheduling for August 20 and that he could not let him off. He later spoke with counsel for the Respondent who told him to let Wiles off, but he was unable to reach Wiles by telephone in two attempts that evening. I find Blackwood's actions in no way lessened the interference with Wiles' Section 7 rights caused by the Respondent's refusal to excuse Wiles from reporting to work on August 20 and/or by its failure to timely and effectively communicate to Wiles that he did not have to report for work after all. Neither does the fact that Riley may have thought Wiles was one of the carriers counsel for the Respondent told him should be released to attend the hearing on August 20, only when needed, as discussed, infra.

Under the circumstances presented here, I find no evidence of interference with the employees' protected rights and no violation of the Act. I am mindful of the need to safeguard the Board's subpoena power from unlawful infringement and recognize that care should be taken to assure that a charging party, who is not an attorney and may not be aware of or appreciate all the legal niceties involved in an unfair labor practice proceeding, has an opportunity to participate and present evidence. However, in the present case, it appears that the Charging Party, Wiles, obtained and served[11] a relatively large number of subpoenas on post office employees and that, had all appeared in Durham on the morning of August 20, the Respondent's ability to deliver the mail in Chapel Hill that day could have been hampered. At the same time, it was apparent that, given the large number of subpoenaed documents counsel for the General Counsel had to examine, the hearing would not commence until the afternoon of August 20 at the earliest. Consequently, it would have served no purpose for all of the subpoenaed employees to have appeared in Durham at 10 a.m. and sat around waiting for the hearing to start. As the day went on, it also became clear that it was unlikely that any of the witnesses subpoenaed by Wiles would be needed on August 20.[12] Counsel for both the Respondent and the General Counsel recognized this and, as might be expected, proposed an arrangement whereby witnesses who were working on August 20 would be relieved and called to the hearing only when they were needed, which I approved. This arrangement was reasonable and accommodated the interests of all concerned.

[11] It appears that none of the subpoenas Wiles handed out was properly served inasmuch as Wiles delivered them to the subpoenaed parties himself and did not tender the prescribed witness fee and mileage. I find this had no bearing on the issues presented here since there is no suggestion that the Respondent acted as it did because it believed the subpoenas were invalid. On the contrary, I find that the Respondent treated the subpoenas as valid in arranging to have Wiles' witnesses appear at the hearing as needed on August 20 and when the hearing resumed on October 13.

[12] When the hearing resumed on October 13, Wiles actually called to testify only three of the employees he had subpoenaed.

As noted above, the witnesses were not told that they could not appear at the hearing, rather, that they would be released to attend as needed. Accordingly, no rights of theirs were infringed. As for Wiles, the alleged violation is that he was told his witnesses would not be let off to attend the hearing. The evidence does not establish this as I do not credit Wiles' testimony that Riley told him his witnesses would not be let off. There is no reason why Riley would tell Wiles this when his instructions were that the witnesses were to be released as needed and each witness was told arrangements would be made for him to attend the hearing when called to testify. Even if Wiles misunderstood the proposed arrangement when he spoke to Riley, it was made clear to him on the morning of August 20, long before he sought to call any witnesses. I shall recommend that this allegation be dismissed.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over these matters pursuant to Section 1209 of the PRA.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing employee James Wiles' request for leave and requiring him to report for work on the morning the hearing on the unfair labor practices complaint on which he was the Charging Party was to commence, the Respondent violated Section 8(a)(1) of the Act.

4. The unfair labor practices found herein affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent did not violate the Act in any other manner alleged in the complaints in these matters.

REMEDY

Having found that the Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]